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Appeal from Chancery Court of Richmond.

Bill by Bruce Bowe, administrator of E. L. Bowe, deceased, against Stuart Bowe and others. From the decree, certain defendants appeal. Affirmed.

C. R. Sands, of Richmond, for appellant.

Hill Carter, of Richmond, for appellees.

CHESAPEAKE WESTERN RY. *v.* SHIFLETT'S ADM'X.

Nov. 11, 1915.

[86 S. E. 860.]

1. Master and Servant (§ 278*)—Injuries to Servant—Evidence.—In an action for the death of a railroad trackman run down by an engine, evidence held not to show negligence in the operation of the engine or the absence of the conductor in charge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.* 9 Va.-W. Va. Enc. Dig. 725.]

2. Master and Servant (§ 137*)—Injuries—Presumptions.—Where employee of a railroad on a track in front of an approaching engine has ample time to step out of danger and is warned, those in charge of the train are justified in presuming that he will look out for himself, particularly as he said that he would take care of himself.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. § 137.* 9 Va.-W. Va. Enc. Dig. 667.]

3. Master and Servant (§ 137*)—Injuries to Servant—Negligence.—Where a section man was run down by switch engine after saying he would look out for himself, and those in charge made every reasonable effort to stop after discovering his peril, they were not guilty of negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. § 137.* 9 Va.-W. Va. Enc. Dig. 667.]

4. Appeal and Error (§ 1001*)—Review—Verdict.—A verdict of the jury will not be set aside unless it is plainly without evidence to support it; but, when there was not evidence enough to carry the case to the jury, a verdict should be set aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.* 10 Va.-W. Va. Enc. Dig. 453.]

5. Master and Servant (§ 97*)—Injuries to Servant—Federal Employers' Liability Act.—Where the master was guilty of no primary

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negligence, there can be no recovery under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665.]).

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. § 97.* 9 Va.-W. Va. Enc. Dig. 667.]

Error to Circuit Court, Rockingham County.

Action by John Shiffett's administratrix against the Chesapeake Western Railway. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

D. O. Dechert and *J. B. Stephenson*, both of Harrisonburg, for plaintiff in error.

John Paul and *Chas. A. Hammer*, both of Harrisonburg, for defendant in error.

CHESAPEAKE & OHIO RY. CO. *v.* BAYLOR.

Nov. 11, 1915.

[86 S. E. 847.]

1. Damages (§ 112*)—Fire—Standing Timber—Measure of Damages.—Where standing timber belonging to plaintiff was damaged by fire set by defendant railroad company's locomotive, the measure of damages was the difference between the value of the timber immediately before and immediately after the fire.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 281-283; Dec. Dig. § 112.* 4 Va.-W. Va. Enc. Dig. 191.]

2. Trial (§ 235*)—Standing Timber—Fire—Measure of Damages—Instructions.—The fact that, in an action for damage to standing timber, plaintiff's witnesses were qualified to testify to its value immediately after the fire set out by defendant railway company's locomotive, while defendant's witnesses examined the timber for the first time several months thereafter, did not render an instruction that the measure of damages was the difference in value between timber as it was immediately before and immediately after the fire erroneous, as destroying the force of defendant's testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 539-541, 543-548, 551; Dec. Dig. § 235.* 7 Va.-W. Va. Enc. Dig. 718.]

3. Trial (§ 256*)—Proper Instructions—Prejudicial Effect—Remedy.—The instruction being proper, defendant's remedy for any prejudicial effect it might have because of the particular situation was by a request for an explanatory charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.* 7 Va.-W. Va. Enc. Dig. 707.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.